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No. 499

In the Supreme Court of the United States

OCTOBER TERM, 1939

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

SANDERS BROTHERS RADIO STATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 470–477) is reported in 106 F. (2d) 321.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1939. A petition for rehearing, filed by the Commission, was denied on August 2, 1939. The petition for a writ of certiorari was filed on November 2, 1939, and was granted December 11, 1939. The jurisdiction of this Court

rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondent appealed from a decision of the Commission granting to another applicant a permit for the construction of a radio broadcast station in the same territory in which respondent operates a station under a license issued by the Commission. Respondent had intervened in the proceeding before the Commission and had opposed the issuance of the permit. The questions are:

1. Is respondent a person "aggrieved or whose interests are adversely affected" by the decision of the Commission, within the meaning of Section 402 (b) (2) of the Communications Act, so that the Court of Appeals had jurisdiction to entertain the appeal?

2. Was the Commission obligated to make findings of fact on the issue of whether the granting of the permit would inflict financial loss upon respondent and, in their absence, should the Commission's decision granting the construction permit be set aside as being arbitrary and capricious?

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475; and as amended by the Act of May

20, 1937, c. 229, 50 Stat. 189; 47 U. S. C. § 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 56–70.

STATEMENT

Respondent has for many years been the licensee of a radio broadcast station, WKBB, formerly located at East Dubuque, Illinois (R. 43–416) and now located at Dubuque, Iowa. On January 20, 1936, the Telegraph Herald, a daily newspaper in Dubuque, Iowa, filed an application for a construction permit to erect a broadcast station to operate during day-time hours only at Dubuque, Iowa, directly across the Mississippi River from East Dubuque, Illinois, on the frequency 1340 kc. with a power output of 500 watts (R. 6). The application was designated for hearing, and notice of the time and place of hearing and of the issues to be determined was given to the applicant Telegraph Herald (R. 20–22). On August 18, 1936, respondent filed a petition to intervene in the proceeding (R. 22), alleging that Station WKBB, of which it is the licensee, derives its revenue principally from the city of Dubuque, Iowa, and that there is insufficient advertising revenue available in Dubuque to support an additional broadcast station.

At the time the Telegraph Herald application was designated for hearing, respondent had pending before the Commission an application for a construction permit to move the transmitter and principal studios of Station WKBB from East

Dubuque, Illinois, to Dubuque, Iowa, and, in addition, to install a new antenna and ground system in connection with its station (R. 25–33). Respondent's application was filed on May 14, 1936, several months after the Telegraph Herald application was filed (R. 409).

A consolidated hearing on the two applications was held before an examiner, commencing on September 14, 1936 (R. 33). Both the respondent and the Telegraph Herald appeared and offered evidence in support of their respective applications (R. 33–380). Respondent introduced evidence showing that prior to the hearing its station had operated at a financial loss (R. 160, 369–370); that the area proposed to be served by the Telegraph Herald station was substantially the same as the area served by respondent (R. 412, 415); that from 85 to 90 percent of respondent's gross revenue came from Dubuque (R. 161); and that of the sixty advertisers in Dubuque relied upon for commercial support of the proposed station, thirty-three had advertised over respondent's station in the past (R. 178).

The examiner submitted his report on October 31, 1936, recommending that the application of the Telegraph Herald be denied and that the application of respondent be granted (R. 380–400). The Telegraph Herald filed exceptions to the examiner's report (R. 400), and oral argument was requested by both applicants (R. 400, 403). On

February 11, 1937, oral argument on behalf of both applicants was made before the Broadcast Division of the Commission (R. 404, 409).

The Broadcast Division of the Commission entered a final order on July 2, 1937, granting the applications of both the respondent and the Telegraph Herald, effective July 27, 1937 (R. 406–407). In its order the Broadcast Division recited that it "found that public interest, convenience, and necessity would be served by granting the applications of the Telegraph Herald for construction permit, and Sanders Brothers Radio Station for construction permit" (R. 406). On July 27, 1937, respondent filed a petition to extend the effective date of the decision, which was denied without opinion by the full Commission on August 18, 1937 (R. 416–418).

On July 30, 1937, the Broadcast Division adopted and published its Statement of Facts and Grounds for Decision (R. 408). The statement recited, among other things: (1) that both applicants were legally, technically, and financially qualified to undertake the necessary construction and operation involved (R. 410–413, 413–416); (2) that there was a need in Dubuque and in the surrounding area of Iowa, Illinois, and Wisconsin for the services proposed by both stations (R. 410); and (3) that no questions of electrical interference were involved because the new station to be operated by the Telegraph Herald would operate during day-

time hours only on the frequency 1340 kc. with a power output of 500 watts, while Station WKBB would continue operation with unlimited time on the air on the frequency 1500 kc. with a power output of 250 watts (R. 413–416).

On July 30, 1937, respondent filed with the Commission a notice and demand that it be served with copies of all reports submitted to the Broadcast Division by the law, engineering and examining departments of the Commission relative both to the application of the respondent and to that of the Telegraph Herald. The demand was refused without opinion by the Broadcast Division on August 18, 1937 (R. 418–420).[1] On August 11, 1937, respondent filed a petition for a rehearing before the full Commission on the decision of the Broadcast Division granting the application of the Telegraph Herald for a construction permit (R. 420–436). The granting of this petition was opposed by the Telegraph Herald (R. 436–453), and a reply to this opposition was filed by respondent on September 10, 1937 (R. 453–468). The petition for rehearing was denied without opinion by the full Commission on December 8, 1937 (R. 468).

On December 14, 1937, respondent appealed to the court below from the order of the Commission

[1] This request was renewed in the Court of Appeals in the form of a suggestion for diminution of record requiring that these reports be sent to the Court of Appeals as a portion of the record. This request was denied by the Court of Appeals on May 6, 1938 (R. 475–476).

granting the application of the Telegraph Herald and asked that court to issue a stay of the Commission's order pending determination of the appeal (R. 1–3).[2] A stay was granted on December 23, 1937. On January 6, 1938, the Telegraph Herald filed a petition to intervene in the proceedings in the Court of Appeals which was granted by that court (R. 4). Motions to dismiss were filed by the Telegraph Herald and by the Commission on January 10, 1938, and January 24, 1938, respectively.

On January 23, 1939, the Court of Appeals, without specifically adverting to whether respondent is "a person aggrieved or whose interests are adversely affected" within the meaning of Section 402 (b) (2) of the Act, reversed and remanded the case to the Commission upon the following grounds: (1) that an "issue of 'economic injury to an existing station through the establishment of an additional station' * * * is sufficient to furnish proper grounds of contest on appeal"; and (2) that the Commission erred in failing to make findings on the issue as to whether the granting of the construction permit to the Telegraph Herald would inflict economic injury upon respondent, and in the ab-

[2] No appeal was taken by any party from that part of the order of the Commission which granted the application of respondent to move the transmitter and studios of Station WKBB to Dubuque, Iowa, and to install a new antenna and ground system, and the order of the Commission is now final in this respect.

sence of such findings the Commission's decision granting the construction permit was arbitrary and capricious and must be set aside as a matter of law (R. 470–477).

On February 9, 1939, the Commission filed a petition for rehearing in which it contended that the court below had no jurisdiction to entertain the appeal because the appellant was not a person "aggrieved or whose interests are adversely affected" by the decision of the Commission complained of, and that, even if the court had jurisdiction, it erred in remanding the case for further findings, since the Act does not require the Commission to make findings when it grants an application for authority to construct and operate a radio broadcast station. The petition for rehearing was denied on August 2, 1939 (R. 478).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that it had jurisdiction to decide the appeal.

(2) In holding that the Commission's decision to grant the application must be supported by detailed findings of fact.

(3) In holding that the Commission must make findings of fact with respect to the competitive effect on respondent of the proposed operation of the new station before a permit for its construction may be granted.

(4) In holding that the Commission's decision to grant the applica[illegible]n was arbitrary and capricious because not suppor[illegible] by findings as to the probable competitive effect of the new station on the respondent's financial condition.

(5) In failing to dismiss the appeal.

(6) In setting aside the decision of the Commission granting the permit to build the new station.

(7) In remanding the case to the Commission with directions to make findings of fact on the question of what the competitive effect of the proposed operation of the new station would be on the financial condition of respondent.

SUMMARY OF ARGUMENT

The two principal issues in this case are whether respondent is a "person aggrieved or whose interests are adversely affected" by the granting of the permit, entitling it to seek review of the Commission's action under Section 402 (b) (2) of the Act, and whether the Commission was obligated to make findings of fact on the issue of whether the granting of the permit would inflict financial loss upon the respondent. Both of these issues may be resolved by determining whether, under the Act, the Commission, in passing upon an application for a construction permit for a new station, is under any duty to protect existing licensees from competition; if the Commission is not under any such duty, respondent, whose interests are affected

only by the threat of prospective competition, has no standing to seek review of the granting of the permit, and the Commission was not obligated to make findings of fact on the issue of financial injury to respondent.

1. There is no provision of the Act expressly stating whether or not the Commission is required to consider the question of competitive effect in granting a new license. Section 307 (a) merely states that the Commission shall grant a license "if the public convenience, interest, or necessity will be served thereby." Analysis of the Act demonstrates that financial loss to an existing licensee due to competition from a new station is not a factor which the Commission must consider in determining whether granting a license will serve the public interest.

The Act does not purport to confer upon the Commission jurisdiction over the business of radio station licensees. The purpose of the Act is to assure allocation in the public interest of the limited number of radio frequencies available; this purpose is achieved by prohibiting any use of radio transmitting equipment except under a license from the Commission. Once an applicant has been licensed to use a particular frequency, the statute contemplates that he shall have the right to operate his transmitting equipment in accordance with the terms of the license. But the Act confers on the

Commission no jurisdiction whatever over the business in connection with which the transmitting equipment is used. The licensee is free to carry on his business as he chooses and, if the public is to be protected from abuses which may result from such economic freedom, that protection must be found in the effects of competition. The decision below compels the Commission to prevent free competition and, at the same time, leaves it without statutory power to correct the abuses incident to unregulated monopoly.

Section 313 of the Act expressly declares that the antitrust laws shall be applicable to broadcasting and that the licenses of offenders may be revoked. It would be inconsistent for Congress to have empowered the Commission to revoke licenses for violation of laws designed to foster competition and at the same time to have required the Commission to encourage monopoly by denying competitors the opportunity to enter the field.

This conclusion is fortified by the fact that, under Section 309 (a), the Commission is not required to hold a hearing before granting a license. Plainly, if Congress had intended to give existing stations a legal right to be protected against competition, it would have provided for consideration of that right by the Commission.

There is nothing in the nature of the license held by an existing station which confers a right to protection from competition. Such a license is an authorization to operate radio transmitting equip-

ment and is in no sense a franchise to engage in any type of business. The rights granted by such a license are extremely limited and are restricted solely to the use of the facilities licensed for operation; they do not comprehend a right to engage in any business and, *a fortiori*, no right to be protected from business competition.

Every consideration of policy repels the suggestion that the Act should be construed as requiring the Commission to consider the issue of competitive effect. The basic theory upon which broadcast licenses have always been allocated is that competition is essential to the maintenance of high quality programs. This is because competition among stations for advertisers means competition among stations for listeners and this in turn means rivalry to present the highest quality programs. Thus the character of radio presentations, and therefore the public interest, is largely dependent on competition.

The Commission has never denied a license to one otherwise qualified on the ground that his competition may injuriously affect an existing licensee. If it be assumed that the language of the Act is sufficiently ambiguous to require interpretation, this administrative construction is entitled to weight.

2. If the Commission is under no duty to protect existing licensees from competition, it follows that respondent, whose interests are affected only by the threat of prospective competition, has no standing

to secure review of the Commission's order under Section 402 (b) (2). It is not enough that respondent may suffer financial loss through the grant of the permit; having no legal right to be free from competition and having no legal interest in the maintenance of its advertising revenues, it is not a person "aggrieved or whose interests are adversely affected" within the meaning of the statute.

Section 402 (b) (2) was not designed to abrogate the settled principle that only those who suffer a legal wrong or injury may seek judicial redress; it was plainly intended merely to make an expeditious remedy available to those persons who, in the absence of this provision, would be entitled to bring an original suit in a court of competent jurisdiction. Any other interpretation of Section 402 (b) (2) would be open to constitutional doubt.

3. Even apart from the jurisdictional question, the decision below must be reversed because it is based on the erroneous premise that the Commission was required to make findings with respect to the issue of the competitive effect of the Telegraph Herald station on respondent. Plainly if this issue is not one which the Commission was required to consider, it is not one with respect to which the Commission was obligated to make findings.

Moreover, even though it be held that the Commission was required to consider the issue of com-

petitive effect, it does not follow that the Commission was obligated to make findings with respect to this issue. The Act contains no provision for detailed subsidiary findings of fact, and the clear implication from the procedure prescribed for the consideration of applications is that no such findings are necessary. It may be presumed that Congress did not write such a provision into the Act because of the intolerable burden which would be imposed on the Commission if it were required to make detailed findings with respect to the thousands of applications which are filed each year, merely to facilitate litigation in the comparatively few cases in which appeals are taken.

There can be no contention that the constitutional requirement of due process makes detailed findings necessary, since any aggrieved person who is unable to secure adequate protection of his rights through the special remedy of direct appeal may institute an original suit in a court of competent jurisdiction. The requirement of due process does not extend further than affording persons who have suffered legal injury from an action of the Commission a right to contest that action in an appropriate judicial tribunal.

If the Commission's action may not be set aside because the Commission did not make detailed findings on the issue of competitive effect, the decision below must be reversed, even if the Commission was required to consider that issue.

The Commission found that the grant of the permit would serve the public interest, convenience, or necessity; that finding may be set aside only if the record demonstrates that it is clearly erroneous in view of the effect of the new station upon respondent's business. No such demonstration can be made.

ARGUMENT

The two principal issues in this case are whether respondent is a "person aggrieved or whose interests are adversely affected" by the granting of the permit, entitling it to seek review of the Commission's decision under Section 402 (b) (2) of the Communications Act, and whether the Commission was obligated to make findings of fact on the issue of whether the granting of the permit would inflict financial loss upon the respondent. Both of these issues may be resolved by the determination of a single question of statutory construction: whether, under the Communications Act, the Commission, in passing upon an application for a construction permit for a new broadcast station, is under any duty to protect existing licensees from competition. We shall contend (1) that the Act imposes no such duty upon the Commission; (2) that respondent, whose interests are affected only by the threat of prospective competition, has no standing to seek review of the granting of the permit; and (3) that, irrespective of the jurisdictional question, the Commission, not being required to consider the

prospective competitive effect of the new station upon existing stations, was not required to make findings of fact on this issue.

If we are in error in these contentions, a second question of statutory construction is presented: whether the Act, expressly or by implication, requires the Commission to make detailed subsidiary findings of fact in support of its ultimate finding that the public interest, convenience, or necessity will be served by granting the application. On this issue we shall contend that the Act contains no such requirement and that a decision of the Commission granting a permit may not be set aside as arbitrary and capricious because of the absence of such findings.

I

UNDER THE COMMUNICATIONS ACT OF 1934, THE COMMISSION, IN PASSING UPON AN APPLICATION FOR A CONSTRUCTION PERMIT FOR A NEW BROADCAST STATION, IS UNDER NO DUTY TO PROTECT EXISTING LICENSEES FROM COMPETITION

There is no provision in the Communications Act expressly dealing with the question of whether the Commission must, in passing upon an application for authority to construct and operate radio transmitting equipment, consider the prospective competitive effect of the new station upon existing licensees. The standard prescribed by Congress to govern the Commission in its consid-

eration of such an application is found in Section 307 (a), which provides:

> The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

Plainly this section, considered entirely by itself, furnishes no standard of action for the Commission to follow. The content of the standard, as this Court has held, is supplied by considerations relating to the context of the Act as a whole, the nature of radio transmission and reception, the scope, character and quality of services, and the advantages which will be enjoyed by the public by the licensing of a station. *Radio Comm'n* v. *Nelson Bros.*, 289 U. S. 266, 285. The answer to the question here at issue, therefore, must be sought by ascertaining the underlying purpose of the Act and by analyzing the specific provisions by which that purpose is sought to be achieved.

This analysis will demonstrate that the Act does not provide for federal regulation of the business affairs of radio station licensees. This being so, it follows that a licensee acquires no right under the Act to protection from competition and, therefore, has no legal standing to question the validity of a license issued to a competitor, and further, that the Commission, in passing upon applications for licenses, is under no duty to consider the com-

petitive effect of a new station upon an existing licensee.

1. The Communications Act is not designed to regulate the manner in which any business (other than the business of common carriers in the public telephone and telegraph fields [*]) shall be conducted. The essential purpose of the Act is to secure to the public the maximum benefit from the use of available radio frequencies. The number of available radio frequencies is quite limited. In the absence of some authority empowered to allocate these frequencies and to regulate the use of radio transmitting equipment, chaotic conditions would result which would prevent effective use of radio facilities by anyone. Congress, recognizing this fact, has provided through the Communications Act for the allocation and regulation of the use of radio frequencies, by prohibiting any use of radio transmitting equipment except under a license from the Communications Commission.

It is significant that the statute makes no distinction between a radio broadcast station, such as that operated by respondent, and any other type of radio station. The Act provides precisely the same procedure to be followed by the Commission and the same standards to be applied by the Commis-

[*] Section 3 (h) of the Act provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." Such a person, therefore, does not come under any of the provisions of the Act which are designed to regulate the conduct of the business of common carriers in the communications field.

sion in licensing a radio station for broadcast purposes as it does for licensing amateur stations, police stations, or any other of the many different types of radio stations.[4] Whether the radio frequency assigned to a particular applicant is used in connection with the business of selling adver-

[4] There are some 38 different classes of radio stations licensed by the Commission and bands of frequencies, or specific frequencies within bands, have been assigned for the exclusive use of each class. A list of the classes of stations with an indication of the frequency assignment to each follows:

Standard broadcast stations—550 to 1,600 kc.

Relay broadcast stations—various specific frequencies in the band 1,620 to 2,830 kc.; certain frequencies above 30,000 kc.

International broadcast stations—various specific frequencies in the 6,000, 9,000, 15,000 and other bands.

Television—frequencies in the band 44,000 to 50,000 kc.; and others.

Facsimile broadcast stations—various specific frequencies in the bands 25,000 kc., 43,600 kc., and above.

High frequency broadcast stations—frequencies in the bands 25,000, 42,000, and above.

Noncommercial educational broadcast stations—frequencies in the band 41,000 kc.

Developmental broadcast stations—specific frequencies in bands ranging from 1,614 to 400,000 kc.

Fixed public point-to-point telegraph stations—specific frequencies in the band 18,000 to 20,000 kc., and other frequencies.

Fixed public point-to-point telephone stations—specific frequencies in the bands 18,000 to 20,000 kc. and other frequencies.

Agriculture stations—specific frequencies 18,000 to 20,000 and other frequencies.

Fixed public press stations—frequencies in the bands 18,000 to 20,000 and other frequencies.

tising, or in connection with an educational or charitable institution, or in connection with the

Public coastal telegraph stations Private coastal telegraph stations Marine relay stations Maritime mobile stations	various specific frequencies in the band 105 to 22,650 kc.
Public coastal telephone stations Private coastal telephone stations	frequencies in the bands 4,477.5 to 22,700 kc.

Coastal harbor stations—specific frequencies in the bands 2,506 to 137,160 kc.

Aeronautical stations—various specific frequencies in bands ranging from 2,612 to 143,460 kc.

Airport control stations—frequencies in the band 130,860 to 140,100.

Flying school stations—frequencies in the band 33,420 to 39,060 kc.

Instrument landing stations—specific frequencies between 93,500 to 110,300 kc.

Radio marker stations—the frequency 75,000 kc.

Aircraft stations—specific frequencies between 333 kc. and 6,210 kc. and others.

Municipal police stations—specific frequencies between 1,610 and 2,490; and between 30,580 and 39,900.

State police stations Interzone police stations and Zone police stations.	frequencies between 2,036 and 5,195 kc.

Marine fire stations—the frequency 1,630 and others.

Special emergency stations—the frequency 2,726 and others.

Forestry stations—2,212 kc. and other frequencies.

Geological stations—frequencies between 1,602 and 1,700 and others.

Mobile press stations—various frequencies between 4,705 and 22,225 kc.

Relay press stations—various frequencies from 30,860 to 39,980 kc.

Motion picture stations—the frequency 1,652 kc. and others.

Provisional stations—31,020 kc. and other frequencies.

Amateur stations—the bands 1,716 to 2,000 kc.; 3,500 to 4,000 kc.; and others.

operation of an amateur station, or for the protection of life and property, or for any other of the multitudinous uses to which radio-transmitting equipment may be put, the scope of the Commission's jurisdiction over the holder of the license is the same. Thus the Commission has no greater power to regulate the activities of respondent's broadcast station than it has to regulate the business of persons operating seagoing vessels, or of persons operating as common carriers by airplane, although both the vessels and the airplanes are required to be equipped with radio-transmitting equipment which must be licensed by the Commission, or than it has to regulate the business of manufacturers of radio-transmitting equipment, although such manufacturers are required to secure a license if they operate such equipment for testing and experimental purposes.

In performing its duty of licensing the use of radio-transmitting equipment, the Commission is chiefly concerned with having the available frequencies put to the most beneficial use from the standpoint of the public. So long as frequencies are available within a particular area, the public interest demands that any qualified person should have the opportunity to use them. However, the demand is usually far greater than the supply of available frequencies. Consequently, the Commission is faced with the task of selecting licensees who are best qualified to serve the public and of

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assigning to those licensees frequencies the use of which will not unduly interfere with reception from stations licensed to operate on the same or other frequencies. Once an applicant has been approved by the Commission and has been licensed to use a particular frequency, the statute contemplates that the licensee shall be permitted to operate his transmitter on that frequency for the period of the license. If a subsequent applicant should apply for a license to use a frequency which would create electrical interference with the reception of an existing station, the Commission would clearly be required to consider this factor in acting upon the application. But consideration of the effect of the new station upon the service rendered by an existing station and of the comparative advantages of the two stations is required under the Act, not for the purpose of safeguarding any vested right of the existing licensee, but rather to insure the best possible use of the radio spectrum for the benefit of the public.

There is an essential difference between the present statute and legislation such as the Interstate Commerce Act which regulates the manner in which a public utility shall be operated. In the regulation of railroads Congress has taken over control of the rates and charges which may

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[3] See also the Oklahoma statute relating to the business of ginning cotton (Oklahoma Compiled Statutes 1921, §§ 3712-3718), analyzed by this Court in *Frost* v. *Corporation Commission*, 278 U. S. 515.

be collected and has otherwise assumed authority to prescribe the manner in which the business shall be conducted. The Transportation Act of 1920 was designed to effectuate that control for the primary purpose of assuring the public an adequate and efficient transportation system. As this Court said in *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 277:

> By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss.

In other words, in the case of the railroads there has been a substitution of governmental regulation for competition as a means of protecting the public. Having undertaken the function of complete regulation of the railroads in the public interest, it is obvious that the correlative duty rests upon the regulatory body not to exercise its author-

ity in a manner that will defeat the public interest by impairing the economic existence of the roads. This principle underlies the decisions of this Court under the Transportation Act of 1920 (c. 91, 41 Stat. 456) and the Emergency Railroad Transportation Act of 1933 (c. 91, 48 Stat. 211) permitting competitors to bring suit to enjoin the establishment of new competitive facilities. *Tex. & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266; *St. Louis Southwestern Railway Co.* v. *Missouri Pacific Railroad Co.*, 289 U. S. 76; the *Chicago Junction Case*, 264 U. S. 258; *cf. Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, 390.

The Communications Act presents an entirely different situation. There is not a single provision in the Act from which it can be inferred that Congress intended by providing a licensing procedure for the use of radio transmitting equipment to subject to regulation the business of the licensee, whether it be the advertising business or any other type of business in connection with which the radio-transmitting equipment is used.[6] Section 3 (h) of the Act expressly provides that "a person engaged

[6] The only reference in the Act to commercial operation of a broadcast station is found in Section 317, which contains a prohibition against broadcasting matter for which any valuable consideration is directly or indirectly paid or promised to the broadcast station from any person without announcing that it is paid for by such person. This provision is similar to the requirement under the postal laws that advertising must be marked as such in publications afforded second-class mailing privileges. 37 Stat. 554; 39 U. S. C. § 234.

in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." The Commission is not authorized to regulate the business of selling radio advertising or any other commercial use of radio frequencies; it is not authorized to regulate the rates for radio service or to limit the return upon the investment in radio broadcast stations. It has no authority, insofar as licensees of broadcast stations are concerned, which corresponds to its power over telephone and telegraph common carriers, to prescribe a uniform system of accounts, to require a certificate of public convenience and necessity before the licensee may engage in any business or extend his business, or to require the approval of the holding by any person of two or more positions of officer or director in more than one licensee corporation. All of these matters are outside the jurisdiction of the Commission, and if the public is to be protected from the abuses which may result from such economic freedom, that protection must be found in the effects of competition.[7] The decision below compels the Commission to prevent free competition notwithstanding the fact that there is no provision of the Act directed to the prevention of the abuses which are the concomitants of unregulated monopoly.

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[7] The Commission refers all complaints alleging "unfair" competition among radio broadcast stations to the Federal Trade Commission, consistent with its position that it has no jurisdiction over the business affairs or commercial aspects of a station's operation.

The fundamental consideration which the court below disregarded is that the status of respondent as a licensee authorized to use radio transmitting facilities is not changed because it is also engaged in the advertising business. In the conduct of its advertising business, it clearly has no right to freedom from competition from anyone else furnishing an advertising medium, whether it be a newspaper, a magazine, or another broadcast station. For example, insofar as this business is concerned, respondent has no more right to be protected from competition by the Telegraph Herald as a radio station than Telegraph Herald, as a newspaper, has a right to be protected from competition by the respondent either as a radio station or if it should propose to enter the newspaper field. As a licensee authorized to use radio transmitting facilities, respondent has a right to protection from undue interference in the operation of its equipment. But the important fact is that the injury with which respondent claims to be threatened here is loss of its advertising revenues and not invasion of its right to use its transmitting facilities.* This is injury with which, under the Act, the Commission is not required to concern itself.

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*It is conceded that the authorization to the Telegraph Herald to construct and operate a station in Dubuque, Iowa, will in no way interfere with the use by the respondent of the facilities which it is licensed to operate or with the reception by listeners of the programs which it presents.

2. Aside from the clear implications of the statute, the Act expressly provides for the maintenance of competitive conditions in radio broadcasting. Section 313 of the Act declares that the antitrust laws shall be fully applicable "to interstate or foreign radio communication," and that the licenses of offenders may be revoked. It is hardly conceivable that Congress would empower the Commission to revoke licenses for violations of laws designed to foster competition and, at the same time, require the Commission to foster monopolies by denying competitors the opportunity to enter the field. Furthermore, the express reference to the antitrust laws is plainly an affirmance and adoption of the public policy declared in those acts.[9] The view that the Commission should foster monopolistic conditions in the industry by protecting existing stations from competition is repugnant to that public policy; in the absence of unequivocal language compelling such an inconsistency, it should plainly be avoided.

3. This conclusion is fortified by the provisions of the Act relating to the procedure for granting

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[9] The legislative history of the Communications Act of 1934 is not only barren of any suggestion that the radio broadcast industry was intended to be exempt from the usual forces of competition, but affirmatively shows that Congress was fully cognizant of the distinction between the regulated monopoly in the telephone and telegraph field, provided by Title II, and the competitive economy for the radio broadcast industry expressly written into Section 313 of Title III. See S. Rep. 781, 73d Cong., 2d Sess., pp. 2, 8; H. Rep. 1918, 73d Cong., 2d Sess., pp. 25, 46-47.

and refusing applications for a license. Under Section 309 (a), the Commission is authorized and required to hold a hearing upon an application for a license only if, upon examination of the application, it is unable to determine that the public interest, convenience or necessity will be served by granting the license. In other words, the Act guards only the right of the applicant to protest the denial of a license; it does not grant to any competitor, even if threatened with possible financial loss, the right to protest the grant of a license to another. If Congress had intended to give existing stations a legal right to be protected against competition, it would undoubtedly have provided expressly for consideration of that right by the Commission.

4. There is nothing in the nature of the license held by an existing station which confers, expressly or by implication, a right to protection from competition. Such a license is an authorization to operate radio-transmitting equipment and is in no sense a franchise to engage in any type of business. The rights conferred by the license are neither absolute nor exclusive. The maximum term of a standard broadcast license under the Act is three years (Section 307 (d)), but the Commission by regulation has fixed the term at one year (F. C. C. Rules and Regulations § 3.34; 4 Federal Register 2717). The license confers no property right in the frequency authorized to be used. Section 309 (b) (1) expressly provides that a "station license

shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein." Section 301 declares that the purpose of the Act, among other things, is to provide for the use of the channels of interstate and foreign radio transmission, but not the ownership thereof, for limited periods of time under licenses granted by the Commission. The license may not be transferred or assigned without the written consent of the Commission (Section 310 (b)). The license may be modified by the Commission on its own motion if such action will promote the public interest, convenience, and necessity (Section 312 (b)). And applicants for licenses under the Act are required to sign a "waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise" (Section 304).

It is clear, therefore, that the rights which are granted by the license are restricted solely to the use of the facilities licensed for operation. There is no difference between the rights conferred by a license to operate a radio broadcast station and the rights conferred by a license to operate any other of the 38 or more types of radio stations (see note, p. 19, *supra*). All of these licenses confer the right to operate radio transmitting equipment; none of them purports to confer a right to engage

in or carry on any business or, *a fortiori*, to be protected from business competition. *Cf. Charles River Bridge* v. *The Warren Bridge*, 11 Pet. 420; *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 173–174; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 483; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118.

5. Every consideration of policy repels the suggestion that the Act should be construed as conferring any right upon the licensee of a radio broadcast station to protection from competition. As was pointed out by the Chairman of the Federal Radio Commission in an early report to Congress (Sen. Doc. 137, 72d Cong., 1st Sess., p. 36), competition is essential to the maintenance of high quality radio programs. The report reveals that the financial success of a commercially operated broadcast station depends on its ability to sell advertising which, in turn, depends on its ability to attract listeners. This necessarily means rivalry among stations to improve the character and quality of their programs. Thus the quality of programs, and therefore the public interest, is largely dependent on competition.[10] The report denominates

[10] A recent expression of the Commission in *In re Spartanburg Advertising Company*, Docket No. 5451, Decision and Order on Petition for Rehearing, decided January 10, 1940, illustrates precisely how this result is brought about:

"* * * The basis for petitioner's opposition to the grant of the application was, and is, that the competition which will result from the operation of a second station in Spartanburg will adversely affect petitioner's ability to operate its

these principles as the American system of broadcasting and they represent the basic theory upon which radio licenses have always been allocated.

station in the public interest. Petitioner, in substance, asserts a right to be the only station in Spartanburg. Neither the license now enjoyed by petitioner nor any provision of the Communications Act of 1934 confers upon petitioner a monopoly of the radiobroadcast facilities in the community which it is now serving. In the radiobroadcast field public interest, convenience, and necessity is served not by the establishment and protection of monopolies, but by the widest possible utilization of broadcast facilities. Competition between stations in the same community inures to the public good because only by attracting and holding listeners can a broadcast station successfully compete for advertisers. Competition for advertisers which means competition for listeners necessarily results in rivalry between stations to broadcast programs calculated to attract and hold listeners, which necessarily results in the improvement of the quality of their program service. This is the essence of the American system of broadcasting.

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* * * As pointed out above, competition in radiobroadcasting means, in so far as listeners are concerned in a particular community, a wider choice of programs, and consequently a heightened listener interest which may very well result in a greater amount of advertising expenditures because of increased listener hours with consequent increased revenues for both stations. Experience has shown that the addition of a competitive station in a community does not bring about the disastrous results sometimes predicted by the licensee of an existing station in the community. More often the protests of the existing station to the establishment of a new station spring not from a desire to insure its continued operation in the public interest, but rather from the purely private interest of seeking a monopoly in a field in which the interests of the public are best served by competitive operation. In the instant case we find no interest of petitioner will be adversely affected by the estab-

Under this system it is assumed that a new station in a community could not take advertising clients away from an existing licensee (thereby perhaps impairing his ability to continue to operate in the public interest) without at the same time rendering a superior service to the public.

Less fundamental, but almost equally important from a practical standpoint, is the tremendous burden which would be placed on the Commission if it were required to determine in every case the economic effect of competition on existing stations. In fact, it is difficult to perceive how the Commission could possibly resolve the questions which would be presented. For example, it is difficult to see how the Commission could determine the effect of competition without at the same time determining what the rates for service should be. Nor could the effect of competition be judged without determining the relative quality of the programs. Obviously, many other equally insoluble issues would be involved.

The decision of the court below, if sustained, would have another very far-reaching effect upon the work of the Commission. Section 307 (d) of the Act requires that applications for renewal be "governed by the same considerations and practice which affect the granting of original applications."

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lishment of a second station in Spartanburg. Upon the record we are satisfied that the effect of the establishment of a second station in this community will be to serve public interest, convenience, and necessity."

Under the decision below, the Commission, not only in licensing new stations but also in passing upon applications for renewals, would have to give consideration to the effect which the operation of one station will have, or is having, upon the ability of other existing licensees to operate their stations in the public interest. Lacking statutory authority to allocate customers, regulate rates, or require the sharing of profits, the Commission would either have to assume such authority or refuse renewal to any successful operator whose competition was unduly effective against other existing stations. Indeed, the greater the ability of an applicant for a license to attract advertising clients, the more imperative would be the duty of the Commission to deny the application.

Moreover, the Commission would be required to consider competition not only between two or more commercial broadcast stations, but also competition between a commercial broadcast station and stations rendering other types of service, as, for example, a broadcast station operated by a religious organization, or an experimental television station. Such a station, by attracting part of the listening public which would otherwise tune in on programs presented by the commercial station, might inflict serious financial loss on the commercial station. Under the decision below, the Commission would be required to consider the effect of this loss in determining whether to grant or renew a license to

the religious organization, or the operator of the television station.

6. Respondent's contention as to the meaning of the Act is also contrary to the administrative interpretation placed on the statute. The Communications Commission, its predecessor, the Federal Radio Commission, and prior thereto, the Secretary of Commerce, have never denied a license to one otherwise qualified on the ground that his competition may injuriously affect an existing licensee. If it is to be assumed that the language of the Act is sufficiently ambiguous to require interpretation, this administrative construction is entitled to great weight. *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1, 13–14; *Hewitt* v. *Schultz*, 180 U. S. 139, 156–157; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345. The weight to be attributed to the administrative construction is even greater where, as here, Congress has reenacted without change the provisions of the statute which have received the administrative interpretation. *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345; *United States* v. *Moore*, 95 U. S. 760, 763; *Brewster* v. *Gage*, 280 U. S. 327, 336–337.

In its brief filed in opposition to the petition for certiorari, respondent argued that the interpretation placed upon the Act by certain Commission decisions supports respondent's view as to the meaning of the statute. An analysis of the decisions cited to support this argument shows that

respondent has misunderstood the nature of the Commission's action. For example, in the *Fall River Herald News Publishing Co.* case, 5 F. C. C. 377, 382, cited by respondent, an application for a license was denied, not because of threatened competition to existing licensees, but because the Commission believed that the applicant would not be able to secure sufficient commercial support to sustain its proposed operation. The issue of the financial ability of the applicant to conduct the proposed operation is one which the Commission is specifically required to consider by Section 319 (a) of the Act. In the *R. R. Jackman* case, 5 F. C. C. 496, 500, the Commission denied an application for the transfer of a license to the licensee of another station serving the same area on the ground that the transfer would substantially reduce competition in the area. Although in its decision the Commission mentioned the competitive disadvantage which would be inflicted upon another licensee, it is clear from the context of this remark that the decisive factor was the threatened reduction in competition which would result if the proposed transferee were licensed to operate two theretofore competing stations. The action of the Commission in considering whether an applicant can expect sufficient commercial support to sustain his operation and in determining that an application for a transfer should be denied when it will materially reduce competition cannot fairly be regarded as adoption

of the view that an existing licensee is entitled to be protected against injurious competition.

The respondent also refers to a number of cases in which the Commission has permitted existing licensees to participate in hearings upon applications and to introduce evidence with respect to the economic effect of granting additional licenses. These cases are not necessarily indicative of the Commission's views as to the scope of its power in granting licenses. Doubtless in many instances the evidence introduced was relevant to the question of whether the applicant would be financially able to sustain the proposed operation. In any event the decisive fact is the action of the Commission in passing upon applications for licenses and not the conduct of administrative proceedings or the rigidity with which the Commission has applied tests as to the relevancy of the evidence introduced in those proceedings. The fact is that the Commission has never denied an application for a license on the ground that the competition of the applicant would injuriously affect existing licensees. If extrinsic aids to interpretation are necessary, this settled administrative construction should be given weight.[11]

[11] In its brief in opposition to the petition for certiorari respondent refers to a statement made in the Commission's brief submitted in the court below in support of the petition for a rehearing. That statement was:

"The Commission is entirely in accord with the view that if the effect of granting a new license would be to defeat the

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RESPONDENT, AS A PERSON WHO IS AGGRIEVED OR WHOSE INTERESTS ARE AFFECTED ONLY BY THE THREAT OF PROSPECTIVE COMPETITION, HAS NO STANDING TO SEEK REVIEW OF THE COMMISSION'S DECISION

If we are right in our contention that the Commission owes no duty to existing licensees to protect them from competition, it follows, we submit, that respondent, whose interests are affected only by the threat of prospective competition, has no standing to secure review of the Commission's order.

The relevant statutory provision is Section 402 (b), which provides:

> An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the

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ability of the holder of an outstanding license to carry on in the public interest, the application for the new station should be denied unless there are 'overweening reasons' of a public nature for granting it."

This statement is a paraphrase of a statement previously made by the Court of Appeals for the District of Columbia in *Great Western Broadcasting Ass'n, Inc.* v. *Federal Communications Commission*, 94 F. (2d) 244, 248, and quoted in its opinion in this case (R. 473). The Commission does not now contend, concede, or admit that this statement, construed as requiring the Commission to hold that competition between stations for advertising revenue is not in the public interest, is a proper interpretation of the Commission's duties under the Communications Act of 1934. Whatever effect the statement may have, it cannot override the provisions of the Act or the consistent administrative interpretation which the Commission has followed in enforcing the Act.

> District of Columbia in any of the following cases:
>
> (1) By any applicant for a construction permit for a radio station * * * whose application is refused by the Commission.
>
> (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

This section is plainly remedial in character. It makes an expeditious remedy available to those persons who, in the absence of this provision, would be entitled to bring an original suit in a court of competent jurisdiction; that is, those who suffer legal aggrievement or whose legal interests are affected by the Commission's action. *United States* v. *Merchants & Manufacturers Traffic Ass'n.*, 242 U. S. 178, 188; *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148; *Sprunt & Son* v. *United States*, 281 U. S. 249, 256–257. There is no intimation in the statute, nor is there any warrant for inferring, that Section 402 (b) (2) was intended to abrogate the settled principle of law that one may complain in a judicial tribunal only of the invasion of some legal or equitable right, as distinguished from mere financial loss. The principle of *damnum absque injuria* applies: if no legal right of respondent has been violated, it has no judicial remedy by appeal under Section 402 (b) (2), or otherwise, to prevent prospective financial damage from competition by Telegraph Herald. *Railroad*

Co. v. *Ellerman*, 105 U. S. 166, 173; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479–483, and cases cited; *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 139–140.

The opposite view expressed by the court below in this case, and later expanded in *Yankee Network, Inc.* v. *Federal Communications Commission*, 107 F. (2d) 212, makes the provisions of Section 402 (b) (2) vague and uncertain in meaning, leaving to speculation what kind of "aggrievement" or "interest" may be protected by appeal. Moreover, if this section be construed as permitting an appeal by one who has suffered no invasion of a legal right, its validity would be questionable under the doctrine that the constitutional power of the federal courts extends only to the decision of a "case or controversy." An appeal, taken under Section 402 (b) (2) by any person not having a legal right claimed to be invaded by Commission action would be no more than a request for an advisory opinion by the court below. Even if the Congress could constitutionally authorize the court below to render advisory opinions, as to which there is substantial doubt,[12] Congress certainly did not in-

[12] The courts of the District of Columbia, after the decision in *O'Donoghue* v. *United States*, 289 U. S. 516, must be taken to serve as Article III courts as well as courts created for the government of the District of Columbia. The constitutional objection to vesting federal, executive, or legislative functions in a court exercising the judicial power defined by Article III rests on the doctrine of separation of powers. If *federal* executive or legislative functions were given to the District of Columbia courts, which also exercise the Article

tend to do so by Section 402 (b) (2). As this Court pointed out in *Radio Comm'n* v. *Nelson Bros.*, 289 U. S. 266, 276, the primary purpose of Congress in amending in 1930 [13] Section 16 of the Radio Act of 1927—which as so amended was reenacted without any changes here material as Section 402 (b) of the Communications Act—was to provide for review of decisions of the court below by this Court.[14] It does not need argument to demonstrate that the purpose of Congress could not be achieved if the court below were authorized to render advisory opinions, since this Court will neither render nor review advisory opinions. *Muskrat* v. *United States*, 219 U. S. 346.

It is consequently immaterial to respondent's standing to appeal under Section 402 (b) (2) that it may suffer financial loss through granting of a permit to the Telegraph Herald; unless it has a legal right to be free from competition or a legal interest in the maintenance of its advertising reve-

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III judicial function, a commingling of executive or legislative with judicial governmental powers would result. The policy of the prohibition against placing any two of these functions in the same hands would cast doubt on the constitutionality of any attempt to achieve this result. There would, on the other hand, be no such objection to adding *District of Columbia* executive or legislative powers, which would involve no coalescence of federal powers into the hands of a single body. Under this view, supported more by logic than by precedent, the *O'Donoghue* case served to overrule dicta in *Postum Cereal Co.* v. *Calif. Fig Nut Co.*, 272 U. S. 693, and *Radio Commission* v. *General Electric Co.*, 281 U. S. 464.

[13] 46 Stat. 844.

[14] See H. Rep. No. 1665, S. Rep. No. 1195, 71st Cong., 2d Sess.

nues, it is not "a person aggrieved or whose interests are adversely affected" within the meaning of the statute. That the respondent has no such legal right or interest is manifest from the considerations adverted to in the preceding section of this brief. As a licensee authorized to use radio transmitting equipment, respondent has the right only to the use of the frequency assigned to it; its license confers on it no franchise to carry on any business, much less to be protected from competition in the conduct of its business (pp. 28–30, *supra*). Consequently, the mere fact that respondent, in connection with its business, operates radio-transmitting equipment under license from the Commission gives it no legal right or interest which it does not otherwise possess to question the validity of competition by the Telegraph Herald. And clearly, as a person engaged in the advertising business, respondent has no such legal right or interest. No person engaged in furnishing an advertising medium, whether it be through the sale of newspaper or periodical space or of radio time, may question a competitor's right to engage in that business. The legality of the permit issued to the Telegraph Herald to operate transmitting equipment may no more be questioned by respondent as a competitor in the advertising business than a power company could question the legality of a loan to competing companies, essential to enable them to engage in the electric power business (*Alabama Power Co.* v. *Ickes*, *supra*); or than a wharfinger could question

the legality of a lease of a dock to a competitor which was essential in the operation of the competitor's business (*Railroad Co. v. Ellerman, supra*); or than the holder of a license from the Federal Power Commission could question the legality of a similar license issued to a competitor to construct and operate a hydro-electric project (*Carolina Power and Light Co. v. South Carolina Public Service Authority*, 94 F. (2d) 520, certiorari denied, 304 U. S. 578).[15]

This case is essentially different from *Frost v. Corporation Commission*, 278 U. S. 515, which involved an Oklahoma statute declaring the business of operating cotton gins to be a public utility and subjecting it to plenary regulation with respect to rates, charges and service. The Court recognized that under this statute a license to operate a cotton gin as a public utility was "a franchise, granted by

[15] On May 15, 1933, the respondent filed in the court below a brief as intervenor in the case of *The Telegraph Herald v. Federal Radio Commission*, 66 F. (2d) 220, an appeal taken by the Telegraph Herald from the grant by the Radio Commission of a modification of respondent's license authorizing it to move its station from Joliet to East Dubuque, Ill. In this brief, respondent successfully contended that the Telegraph Herald had no standing to maintain an appeal because it had failed to establish any legal right entitled to judicial recognition and it was not, therefore, a "person aggrieved or whose interests are adversely affected" within the meaning of Section 16 of the Radio Act. Respondent contended that Telegraph Herald had no legal right to contest the grant of a license to it either as a prospective applicant for a radio station license or as one "claiming protection for its newspaper interests." (Br., p. 5.)

the state in consideration of the performance of a public service; and as such it constitutes a property right * * *." 278 U. S. at 520. The owner of the franchise was therefore held to be entitled to resort to a court of equity to restrain illegal operation of a cotton gin "upon the ground that such operation is an injurious invasion of his property rights." 278 U. S. at 521.

All of the factors considered determinative by the Court in the *Frost* case are absent here. A licensee authorized to operate radio transmitting equipment is expressly declared *not* to be a common carrier (Section 3 (h)); the business which the licensee conducts is subject to no regulation by the Commission (pp. 18–25, *supra*); and the license cannot possibly be construed as a franchise to carry on any business whatever (pp. 28–30, *supra*).

Respondent may urge that Section 402 (b) (2) *creates* a limited right in an existing station to be free from competition from new stations unlawfully licensed by the Commission. But since, as we have pointed out, the substantive provisions of the Act confer upon an existing licensee no right whatever to be protected from competition, and since the Commission is not even required to hear the protest of such a licensee against the grant of a permit to a competitor (p. 28, *supra*), it would be anomalous indeed if the review provisions of the statute were intended to create the right otherwise denied.

It is to be noted, too, that if the Commission should, under Section 312 (b) of the Act, modify

a license on its own motion, instead of modifying it upon application under Section 309 (a) (as respondent's license was modified, for example, to permit it to move from Joliet, Ill., to East Dubuque), a licensee threatened with financial loss by this action of the Commission could not appeal under Section 402 (b) (2) but could seek judicial relief only in a proceeding under Section 402 (a), which adopts the procedure prescribed by the Urgent Deficiencies Act. Obviously such a suit could be maintained only if the complainant established that the action of the Commission invaded a legal right conferred upon him by common law or by the substantive provisions of the Act (*United States* v. *Merchants & Manufacturers Traffic Ass'n, supra; Edward Hines Trustees* v. *United States, supra; Sprunt & Son* v. *United States, supra*); the provisions of Section 402 (b) (2) would be inapplicable and could not, therefore, be resorted to in order to find a legal interest in the complainant. If Section 402 (b) (2) be construed as *creating* a legal right in a complainant proceeding under that section, it would mean that Congress gave an existing licensee a standing to complain of an order of the Commission, if entered pursuant to an application, but no standing to complain of an order of the Commission, causing precisely the same financial damage, if entered on the Commission's own motion. Such caprice should plainly not be imputed to Congress.

Similarly, if Telegraph Herald commenced operation without a license, respondent could seek

judicial redress only by resort to a court of general equity jurisdiction. In such a suit, again, it obviously could not avail itself of the provisions of Section 402 (b) (2) to establish a legal right invaded by the Telegraph Herald's unlawful competition. There is no reason to presume that Congress intended to give an existing licensee any greater right to complain of competition from a station operated under a license invalidly issued than it has to complain of competition from a station operated entirely without license.

Moreover, the practical aspects of the decision below are such as to repel the suggestion that Congress designed the statute to grant a right of appeal to one whose interests are affected only by the threat of competition from a new station. Such a rule would mean, logically, that almost every person holding a radio broadcast license, as well as many persons not operating radio-transmitting equipment at all, could seek such review simply because they might suffer financial loss. There is intensive competition among radio stations, even though not located in the same community, for nonlocal advertising, particularly for so-called "national spot" advertising. This is advertising placed on radio stations by national advertisers who allocate their radio advertising expenditures not only on the basis of the popularity of the stations in a given community, but also on the basis of the relative returns expected from

different communities.[16] Clearly, therefore, the grant of a license to a new station in one locality may result in financial loss to existing stations in other localities, giving them, under the ruling below, a standing to seek appeal. Moreover, any new station which serves as an advertising medium will be in direct competition with persons furnishing other types of advertising media: newspapers, magazines, billboards, etc.[17] The operation of the new station may well inflict serious financial loss upon competitors such as these, yet it is hardly possible that Congress intended to give them, for that reason, a right to appeal from the Commission's grant of the permit.

It is manifest, therefore, that Section 402 (b) was designed only for the remedial purpose of granting an expeditious appeal to those whose legal rights are invaded, and that since no legal right of respondent has been violated, the Court of Appeals was without jurisdiction to entertain the appeal.

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[16] In 1938 this form of advertising produced $28,000,000 out of $73,000,000, or 38½ percent, of the broadcast revenue of 660 stations. F. C. C. Release No. 34845, issued June 28, 1939.

[17] More money is spent in radio advertising than in any other advertising medium with the single exception of the newspapers. The radio broadcast industry has achieved this position only after intense competition with persons furnishing the other advertising media. In 1938 it had 20 percent of the total advertising volume as compared with 2 percent of the total in 1928. Printers Ink, June 16, 1938, pp. 19–22; Printers Ink, March, 1939, p. 18

III

THE COMMISSION WAS NOT REQUIRED TO MAKE FINDINGS WITH RESPECT TO THE COMPETITIVE EFFECT OF GRANTING THE PERMIT UPON EXISTING LICENSEES

1. If our position is sound that the Commission has no duty under the Act to protect existing stations from competition, the decision below must be reversed, even apart from the jurisdictional question. The sole ground upon which the court below set aside the order of the Commission and remanded the case was the failure of the Commission to make findings on the issue of competitive effect. It needs no argument to demonstrate that if this issue is not one which the Commission was required to consider, it is not one with respect to which the Commission was obligated to make findings.

2. Moreover, the decision of the court below is erroneous even though it be held that the Commission was required to consider the issue of competitive effect and that the respondent had standing to appeal. As stated above, the sole ground upon which the court below reversed the order of the Commission was because the Commission failed to make findings with respect to the issue of competitive effect. The court did not hold, and we believe on the record here could not have held (p. 54, *infra*), that the grant of the permit to the Telegraph Herald was not in the public interest, even though the competitive effect of the new station upon respondent's business were considered.

The court's decision can be sustained, therefore, only if its fundamental postulate is sound—namely, that the Act requires the Commission, in granting an application for a license, to make detailed subsidiary findings of fact in support of its ultimate finding that granting the license will serve the public interest, convenience, or necessity. The court below, in several cases involving denials of licenses, has taken the position that the Act does contain this requirement. *Missouri Broadcasting Corp.* v. *Federal Communications Commission*, 94 F. (2d) 623, certiorari denied, 303 U. S. 655; *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2d) 91; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 554, certiorari denied, 305 U. S. 613. We believe, however, that analysis of the statute demonstrates that these decisions are erroneous, at least if applied to cases involving the granting of a license.

The Act is explicit in prescribing the procedure to be followed by the Commission in granting or denying a license. Section 309 (a) provides in substance that if the Commission is able to determine, upon examination of an application for a license, that the public interest, convenience, or necessity will be served by granting it, it shall authorize issuance of the license.[18] Only in the

[18] Under Section 308 (b), the Commission may require from the applicant further written statements of fact under oath to enable it to determine whether the application should be granted or denied.

event that the Commission, upon such an examination, does *not* determine that the granting of the license would serve the public interest is it required to accord the applicant an opportunity to be heard. In other words, the Act provides for a hearing only to give an applicant an opportunity to protest denial of a license, and not to give others an opportunity to protest granting of a license.

Plainly, since the Commission may grant a license without a hearing, it is not required to make findings of fact other than the ultimate finding that the public interest, convenience, or necessity will be served by granting the application; in a situation such as this, detailed subsidiary findings would be both inappropriate and superfluous. It seems clear, too, that if the Commission is not required to make findings when it grants an application without a hearing, it is not required to make findings in cases where it determines, in its discretion, that a hearing should be held before the license is granted. No provision of the statute authorizes any such distinction to be drawn. And simply because the Commission, as a matter of administrative practice, sometimes issues a statement concerning the more important bases of its action, as it did in this case, does not mean that if such statement is not complete or is even erroneous, the Commission's action is illegal. The issuance of such a statement is analogous to announcements made by other agencies of their reasons for taking some executive or administrative action. Such an

announcement may, in the discretion of the agency, be as complete or as meager as the agency chooses. See *Virginian Ry.* v. *Federation,* 300 U. S. 515, 561–562.

Neither the Commission nor its predecessor, the Federal Radio Commission, has ever assumed, in acting upon an application for a new license or for the renewal or modification of an existing license, that any detailed findings of fact were required. Hundreds of thousands of such applications have been granted without any detailed findings having been made, only an entry on the Commission's minute book evidencing the action taken. If the Commission were obligated to make detailed findings with respect to every application made for a new license or for the renewal or modification of a license, an almost intolerable burden would be placed on it. This practical consideration is doubtless the reason why Congress did not write into the Act any requirement for detailed findings, and was certainly a determining factor in molding the consistent administrative practice.

In *Missouri Broadcasting Corporation* v. *Federal Communications Commission,* 94 F. (2d) 623, certiorari denied, 303 U. S. 655, the court below expressed the view that the requirement of Section 402 (c) that in the event of an appeal from an order of the Commission to the Court of Appeals the Commission shall within 30 days after the filing of the record, "file a full statement in writing of the facts and grounds for its decision as found and

given by it" implied that the statement to be filed by the Commission should be merely a formal restatement of factual findings previously made. See also *Saginaw Broadcasting Co.* v. *Federal Communications Commission, supra; Heitmeyer* v. *Federal Communications Commission, supra.* This view we believe to be untenable since, if the Commission were required to make detailed findings of fact, those findings would be part of the record previously filed in the court below and there would therefore be no purpose served by the "full statement" expressly provided for by Section 402 (c).

Nor can a requirement that detailed findings be made be spelled out of the provision of Section 402 (c) that review by the Court of Appeals "shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive" unless clearly arbitrary or capricious. It does not follow that, because findings of fact, when made, are binding upon the court below if supported by substantial evidence, the Commission is required to make detailed findings whenever it acts, with hearings or without. It may be that the requirement that the Commission hold a hearing before denying a license implies that, in the case of such a denial, the Commission should make findings; if so, Section 402 (c) makes those findings conclusive when supported by substantial evidence. And in those contested cases where the Commission, in the exercise of its discretion, makes detailed findings in

granting an application, Section 402 (e) would seem likewise to make those findings binding if they have substantial basis in the record. This section operates, therefore, as its legislative history indicates that it was intended to operate,[19] as a restriction upon the scope of review by the Court of Appeals; nothing in the language of the section or in its legislative history indicates that it was designed for the further purpose of prescribing or limiting the procedure to be followed by the Commission.

There can be no contention that the constitutional requirement of due process requires the Act to be construed so as to provide for detailed findings by the Commission. Any aggrieved person who is unable to secure adequate protection of his rights by availing himself of the special remedy of direct appeal may institute an original suit in a

[19] Section 16 of the Radio Act of 1927 (44 Stat. 1162), the predecessor of Section 402 (e), provided that the Court of Appeals might "alter or revise the decision appealed from and enter such judgment as to it might seem just." In *Radio Commission* v. *General Electric Co.*, 281 U. S. 464, this Court held that this Section made the court below a "superior and revising agency" in the administrative field, thus precluding this Court from reviewing a judgment of the court below directing the Commission to issue a license upon the terms found in the expiring license. Section 16 was thereupon amended (c. 788, 46 Stat. 844) to read, so far as here material, substantially as does the present Section 402 in order that the Court of Appeals would be limited to judicial, as distinguished from administrative, review, thereby giving this Court jurisdiction to review its decisions. H. Rep. No. 1665, S. Rep. No. 1105, 71st Cong., 2d Sess. See *Radio Commission* v. *Nelson Bros.*, 289 U. S. 266, 276.

court of competent jurisdiction (Section 414). In such an action he would have full opportunity to present any evidence which was relevant and material to the issues and the court would be free to examine any facts which the Commission had failed to consider in granting the application. *Virginian Ry.* v. *Federation*, 300 U. S. 515, 562. The requirement of due process clearly does not extend further than affording persons who have suffered legal injury from an action of the Commission a right to contest that action in an appropriate judicial tribunal.

We are not unmindful of the fact that in several cases this Court has declared that a complete statement of the grounds upon which an administrative agency acts is desirable for a proper consideration of the case in the courts. *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86; cf. *Virginian Ry.* v. *United States*, 272 U. S. 658, 675; *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464–465.[20] This fact, together with other considera-

[20] It should be pointed out that an order granting an application for a radio station license is essentially different from the orders which were under review in the *Baltimore & Ohio* and *Florida* cases, *supra*; it does not, as did those orders, purport to compel obedience under penalty to regulations clearly and directly impinging upon property rights. The person most directly affected by an order of the Commission granting a license is the applicant, who is in no way harmed by the absence of detailed findings. That others may be affected indirectly through the operation of the applicant's station is a possible but by no means inevitable result. The

tions, has impelled the Commission voluntarily to set forth the grounds of its decisions in most contested proceedings before it, as it did in the case at bar (R. 409–416). But, as pointed out in the *Baltimore & Ohio* case, the "lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court, * * * is not fatal to the validity of the order" (293 U. S. at 464–465). In the absence of a statutory mandate that such a complete statement be made, only the basic, quasi-jurisdictional finding is necessary (*id.*)—in this case, that the grant of the license will serve the public interest, convenience, or necessity. That finding the Commission has made (R. 416).

3. If the grant of the license to the Telegraph Herald may not be set aside because of the Commission's failure to make detailed findings on the issue of competitive effect, the decision below must be reversed, even if the Commission were required to consider that issue. The Commission found that the construction and operation of the new station would serve the public interest, convenience, or necessity; that finding may be set aside only if the record demonstrates that it is clearly erroneous in view of the effect of the new station upon respondent's business. No such demonstration can be

framework of the Act shows that Congress was not sufficiently concerned about this contingency to require the Commission to make detailed findings when it grants an application.

made. The evidence introduced by respondent tended to establish only that it would suffer some financial loss (see p. 4, *supra*); it did not establish that the threatened diversion of some of respondent's advertising revenue to the Telegraph Herald would be contrary to the public interest. Consequently, even if this question is in issue, the Commission's finding can not be set aside as in disregard of the evidence or as arbitrary or capricious.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed with instructions to dismiss respondent's appeal.

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JANUARY 1940.

APPENDIX

The relevant provisions of the Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended by the Act of June 5, 1936, c. 511, 49 Stat. 1475; and as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189; 47 U. S. C. 151 *et seq.*) are as follows:

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

* * * * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * * * *

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the

District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(d) Determine the location of classes of stations or individual stations;

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the fre-

quencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

* * * * *

SEC. 307.

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies,

hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

* * * * *

SEC. 309.

(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Com-

mission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SEC. 310.

* * * * *

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control

of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.

SEC. 312.

(a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of

fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

(b) Any station license hereafter granted under the provisions of this Act, or the construction permit required hereby and hereafter issued, may be modified by the Commission, either for a limited time or for the duration of the term thereof, if in the judgment of the Commission, such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing

of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

SEC. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or

under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the

District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

* * * * * *

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the

proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) * * * The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. * * *

* * * * * *

SEC. 402.

(a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license; or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act. (As amended May 20, 1937, c. 229, § 11, 50 Stat. 197.)

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of

the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission. (As amended May 20, 1937, c. 229, § 12, 50 Stat. 197.)

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said

appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal. (As amended May 20, 1937, c. 229, § 13, 50 Stat. 197.)

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Pro-*

vided, however, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

* * * * *

SEC. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: *Provided, however,* That in the case of a decision, order or requirement made under Title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application

shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

SEC. 414. Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

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